

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re :

RANDALL'S ISLAND FAMILY GOLF :  
CENTERS, INC., *et al.*, :

Debtors. :  
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Chapter 11  
Case Nos. 00-41065  
through 00-41196 (SMB)

(Jointly Administered)

2009 OCT 25 P 4 34  
S.D.N.Y.  
U.S. BANKRUPTCY COURT

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**Brief of Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency) in  
Support of its joint Motion Compelling the Examination of Philip J. Gund**

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**Daniel C. Fleming, Esq.**  
**On the Brief**

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## **FACTUAL BACKGROUND**

Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency) are secured creditors in the within matter. According to statements made at the Initial Case Management Conference held in this matter on October 23, 2000, Dominic Chang, Chief Executive Officer of Family Golf Centers, Inc., has been removed. Fried, Frank, Harris, Shriver and Jacobson, counsel for the Debtors, announced their intention to file an emergent motion to install Philip J. Gund, an employee of Zolfo Cooper, LLC, special court appointed bankruptcy consultants to the Debtors, as the new Chief Executive Officer of Family Golf Centers, Inc. Upon information and belief based on statements made by Dominic Chang to Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency), Mr. Gund is supposedly going to receive monthly compensation of \$175,000. Counsel for the Debtors further indicated that the motion will be returnable on October 31, 2000. Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency) wish to immediately examine Mr. Gund prior to that date to assess his credentials and whether Mr. Gund is qualified and capable of assuming these duties. Additionally, Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency) require the immediate examination of Mr. Gund prior to that date to assess any and all potential conflicts of interest that Mr. Gund may incur in his capacity as Chief Executive Officer of Family Golf Centers, Inc. Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency) are willing to limit their examination of Mr. Gund to two hours.

**POINT I.**  
**CHINATRUST BANK (U.S.A.) AND CHINATRUST COMMERCIAL BANK (NEW YORK AGENCY) ARE ENTITLED TO BROAD DISCOVERY UNDER FEDERAL BANKRUPTCY RULE 2004.**

Pursuant to Federal Bankruptcy Rule 2004,

... on motion of any party in interest, the court may order the examination of any entity. ... The examination of an entity under this rule ... may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In ... a reorganization case under chapter 11 of the Code ..., the examination may also relate to the operation of any business and the desirability of its continuance, to source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefore, and any other matter relevant to the case or the formulation of a plan.

The purpose of this provision of the Code, therefore, is to permit a party in interest to determine that the debtor's estate is being properly managed and that discharge is appropriate. Any Rule 2004 examination must be done pursuant to an order authorizing the examination requested by motion. In re Hickman, 151 B.R. 125 (Bankr. N.D. Ohio 1993). Subpoenas issued to compel entities to attend a Rule 2004 examination are governed by Federal Bankruptcy Rule 2004(c):

**Compelling Attendance and Production of Documentary Evidence.** The attendance of an entity for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

Rule 9016 applies Fed. R. Civ. P. 45 for subpoenas. Case law makes clear that the subpoena must be preceded by an Order of court allowing the examination to commence. In re

Hickman, 151 B.R. at 128; see generally In re Arkin-Medo, 44 B.R. 138 (Bankr. S.D.N.Y. 1984).

The scope of examination under Rule 2004 is quite broad. As determined by the Court:

... the rule contemplates a broad and far-reaching inquiry, even a "fishing expedition", and that creditors and third parties, as well as the debtor, may be examined. ... The purpose of a Rule 2004 examination is to allow the court to gain a clear picture of the condition and whereabouts of the bankrupt's estate, ... and the examination of witnesses having knowledge of the debtor's acts, conduct, liabilities, assets, etc. is therefore proper.

In re Johns-Manville Corporation, et al., 42 B.R. 362, 364 (S.D.N.Y. 1984) (citations omitted).

The Court further determined that:

... the inquiry may "cut a broad swath through the debtor's affairs, those associated with him, and those who might have had business dealings with him."

In re Johns-Manville Corporation, 42 B.R. 362 at 363 (citing In re Mantolesky, 14 B.R. 973, 976 (Bankr. D.Mass. 1981)). In fact, the original purpose of Rule 2004 was to assist the bankruptcy trustee to maximize the estate's value by marshalling its assets and to proceed with any necessary litigation. In re the Drexel Burnham Lambert Group, Inc., et al., 123 B.R. 702, 708 (Bankr. S.D.N.Y. 1991) (citing Zydney v. New York Credit Men's Association, 113 F.2d 985 (2d Cir. 1940)). "Thus, a long line of cases, starting with Cameron v. U.S., 231 U.S. 710, 34 S.Ct. 244, 58 L.Ed. 448 (1914), have defined the purpose of a 2004 examination. The object of the examination is to show the condition of the estate and to enable the Court to discover its extent and whereabouts, and to come into possession of it, that the rights of the creditor may be

preserved.” In re the Drexel Burnham Lambert Group, Inc., et al., 123 B.R. 702 at 707 (citing Cameron, 231 U.S. at 717, 34 S.Ct. at 246, 58 L.Ed. at 452).

The Courts have also determined the scope of a Rule 2004 inquiry with regard to an individual that is not a party to the bankruptcy action:

There is no precise rule governing the admissibility of the such testimony, other than it should be reasonably pertinent to the subject of inquiry. In general, a large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings, or otherwise ... Reasonable examination should not be allowed to be checked by constant objections that the materiality of the answer may not be immediately apparent, where no harm can arise to the witness from the disclosure. ... If the result of such an examination may often be a considerable amount of immaterial testimony, this is a much less evil than to stifle examination by technical rules which would defeat the purpose of the act, and discredit the administration of the law in the interest of creditors.

In re the Drexel Burnham Lambert Group, Inc., et al., 123 B.R. 702 at 708 (citing In re Foerst, 93 F. 190, 191 (S.D.N.Y. 1899)). “The understanding generally acceptable today is that the scope of a Rule 2004 examination is very broad. Rule 2004 discovery is broader than discovery under the Federal Rules of Civil Procedure, and has fewer procedural safeguards. It can be legitimately compared to a fishing expedition.” Id., at 711 (citing In re Vantage Petroleum Corp., 34 B.R. 650, 651 (Bankr. E.D.N.Y. 1983). See also In re CIS Corporation, 123 B.R. 488, 490 (S.D.N.Y. 1991) (citations omitted).

Case law therefore provides that the scope of discovery under Bankruptcy Rule 2004 is broader than that afforded under the Federal Rules of Civil Procedure, and examination by a

creditor of a party or non-party is appropriate when that examination concerns the administration of the bankrupt's estate.

**POINT II.**  
**CHINATRUST BANK (U.S.A.) AND CHINATRUST COMMERCIAL BANK (NEW YORK AGENCY) ARE ENTITLED TO DISCOVERY UNDER FEDERAL BANKRUPTCY RULE 2004 CONCERNING THE CREDENTIALS AND QUALIFICATIONS OF PHILIP J. GUND BECAUSE IT IS RELEVANT TO THE PROPERTY AND FINANCIAL CONDITION OF THE DEBTOR AND TO THE ADMINISTRATION OF THE DEBTOR'S ESTATE.**

Underscoring any Rule 2004 motion is the demonstration by the moving party that the documents and information sought are relevant. Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency) seek testimony and documentary evidence from Mr. Gund concerning his credentials and qualifications to serve as the Chief Executive Officer for Family Golf Centers, Inc. That evidence is relevant because competent management is critical to maximize the potential for successful reorganization of Family Golf Centers, Inc. under Chapter 11.

Counsel for the Debtors, Fried, Frank, Harris, Shriver and Jacobson, announced their intention to replace the now-ousted Dominic Chang, former Chief Executive Officer of Family Golf Centers, Inc., with Philip J. Gund. Philip J. Gund is an employee of Zolfo Cooper, LLC, special bankruptcy consultants retained by the Debtors. Upon information and belief based on statements made by Dominic Chang to Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency), Mr. Gund is supposedly going to receive monthly compensation of \$175,000. No evidence has been offered as to the qualifications and credentials of Mr. Gund to serve in this capacity, and neither has it been conclusively established that no conflict of interest will result should the Court ultimately approve Mr. Gund, serving as Chief Executive Officer for Family Golf Centers, Inc. Before being appointed as bankruptcy consultants to the Debtors,



Zolfo Cooper, LLC was required to affirm to this Court that it held no interest in the outcome of these bankruptcy proceedings. With a representative of Zolfo Cooper, LLC serving as Chief Executive Officer of Family Golf Centers, Inc., both Mr. Gund and Zolfo Cooper, LLC need to assure all of the bankruptcy estates that they will not have an incentive to unduly prolong these proceedings, and extend compensation for Mr. Gund and for Zolfo Cooper, LLC longer than is appropriate.

Additionally, the Debtors retained Zolfo Cooper, LLC well before filing their Chapter 11 bankruptcy petitions. Upon information and belief, Chase Manhattan Bank, N.A. urged the Debtors to retain Zolfo Cooper, LLC as special bankruptcy consultants. Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency) require the deposition of Mr. Gund to discover any and all information regarding potential conflicts of interest.

Therefore, as secured creditors with a vested interest in ensuring that the Chapter 11 reorganization proceed as expeditiously as possible and with minimal expense to the Debtors' estates, the immediate disclosure of Mr. Gund's credentials and qualifications is relevant to the administration of the Debtors' estates, to establish that Family Golf Centers, Inc. is run by competent, well-qualified and unbiased management, and that management is as beneficial as possible for the Debtors' estates.

## **CONCLUSION**

For the foregoing reasons, Chinatrust Bank (U.S.A.) and Chinatrust Commercial Bank (New York Agency) request a final Order compelling the immediate Rule 2004 examination of Philip J. Gund.

Respectfully submitted,

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